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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 171

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1962. The petition for a writ of certiorari was filed on June 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district judge could properly make a finding of contempt upon the certified copy of the transcript of proceedings before a referee in

bankruptcy, where the contemnor did not present evidence although afforded an opportunity to do so.

2. Whether the action of petitioner in pounding his fist upon the bench after having been admonished that his evasiveness in answering questions was contemptuous was excused by alleged errors in the procedure followed by the referee in conducting his examination under Section 21(a) of the Bankruptcy Act.

STATUTES INVOLVED

Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), provides:

> (a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt.
>
> * * * * * *

Section 41 of the Bankruptcy Act, 11 U.S.C. 69, provides:

> (a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: *Provided,* That a person other than a bankrupt or, where the bankrupt is a corpora-

tion, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

(b) The referees shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of the court of bankruptcy or in the presence of the judge.

STATEMENT

1. On December 22, 1961, petitioner, pursuant to Section 41 of the Bankruptcy Act, 11 U.S.C. 69, was adjudicated guilty of criminal contempt by the United States District Court of the Eastern District of Wisconsin (R. 2–3). The referee in bankruptcy had certified that petitioner had engaged in contemptuous conduct on November 16, 1961, while he

was testifying in an examination under section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), as follows (R. 4–6):

> [T]hat on five separate occasions during the course of such examination I found it necessary to admonish said James J. Donohue and to direct him to answer certain questions put to him by the examiner, all of which appear in the official transcript hereto attached; that during these proceedings and after I had directed said James J. Donohue to answer the questions or be cited for contempt, said James J. Donohue got out of the witness chair, hit the Bench with his fist and shouted, "Then cite me for contempt! This is still America and I won't be pushed around by anybody!" That thereafter I adjourned said proceedings for the purpose of making his certification of contempt.

Attached to the certificate was the official transcript of the examination together with documents filed in the proceedings (R. 5–6).

On December 12, 1961, the district judge issued an order requiring petitioner to appear before the judge and show cause why he should not be adjudged in contempt by reason of the facts certified by the referee (R. 3). On December 21, 1961, petitioner appeared in court with counsel. The district judge, after hearing oral argument of counsel and after examining the official transcript and the documents, adjudged that petitioner "was, by his conduct, guilty of criminal contempt of court" and fined him the sum of $100 (R. 2).

2. On November 16, 1961, petitioner had appeared as a witness before the referee in bankruptcy with his attorney Paul Runkel (R. 7). He had been subpoenaed for examination with respect to the property of Herbert L. Timmerman, Jr., the bankrupt, and had been commanded to produce records concerning two inventories (taken on or about June 27, 1960) of the stock of merchandise located at the Town House Motel, a tavern owned by petitioner and another (R. 21–22). Examination by the attorney for the trustee in bankruptcy disclosed that petitioner and his partner had rented the tavern to Timmerman from July 1, 1959 to June, 1960 (R. 8, 11). Petitioner produced a written document showing an inventory prepared by Timmerman but denied he had any other records (R. 13, 20–22). The questions posed to petitioner centered around this inventory and a meeting at Runkel's office on June 27, 1960 attended by petitioner, his partner and Timmerman. When petitioner was asked whether Exhibit 2 was an inventory of the stock of merchandise in the motel on June 27, petitioner responded that the exhibit represented pieces of paper that Timmerman gave him containing ambiguous and absolutely worthless figures (R. 12–13). At this point the examiner requested the referee to direct petitioner to answer whether the exhibit consisted of inventory sheets. Petitioner's attorney, Paul Runkel, interrupted the examiner saying that petitioner should be allowed to answer the question.

When Runkel told the referee that he was appearing as the attorney for the witness, the referee ruled: "Well, on these 21-A examinations a witness may have an attorney present, of course, but he can't take part in the examination. I'll rule that if the witness wishes to have a recess to discuss matters with his counsel and get legal advice, he may do so, but the attorney for the witness may not participate in this examination" (R. 14). Petitioner, after being pressed for an answer, acknowledged that Timmerman had told him that Exhibit 2 was the inventory of the stock of merchandise.

With respect to the meeting in the lawyer's office, petitioner testified that there was a lot of calculating as to what was due (R. 18). He was asked whether he had not claimed a shortage of linen and the following ensued (R. 19):

> Q. * * * You also discussed the question of the shortage of linens, did you not?
>
> A. I knew that he stole the merchandise out of there, because when I passed the house he was living in, I seen the drapes and bedspreads and rugs all laying out there, airing in front of the house.
>
> Q. Did you discuss the question of linens?
>
> A. I discussed missing materials that belonged to the hotel.
>
> Q. Did you not also include a discussion of the linens?
>
> A. It included a discussion of everything.

The examiner accused petitioner of attempting to give devious answers. The referee then admonished petitioner "I'll instruct you to answer the question

as directly as you can. If you can't answer it, say so, but I think it can be answered Yes, or No. However, if you wish to make an explanation after you've answered Yes, or No, that's alright" (R. 19).

Petitioner admitted that he had calculated on a paper at Runkel's office the total amount owned by Timmerman but said he was not aware if such a paper was still in existence (R. 19–21). The only paper he found in connection with the conference was Exhibit 2. Following an interchange between the examiner and petitioner over whether he was answering the question asked, the referee told petitioner that he should just answer the question (R. 22).

Petitioner denied that he included $600 as inventory in determining the total amount that Timmerman owed, stating that $600 could not have been included because no inventory was taken. The examiner then asked if Timmerman had claimed the inventory to be $927. Petitioner responded twice that Timmerman gave him "that sheet of paper" but that when he checked at the tavern there was not even one full bottle of whiskey (R. 23). The following then occurred (R. 24):

> THE COURT [referee]. Mr. Donohue, that question is very plain. It's a simple question—whether or not Timmerman claimed that was a $927 inventory. Now, did he,—or didn't he?
>
> A. I don't know, the figures speak for themselves.
>
> THE COURT. What did Mr. Timmerman claim?
>
> A. He just gave me the figures.
>
> THE COURT. Well, go ahead.

The examiner then asked if each inventory sheet given to him by Timmerman had been totaled and petitioner replied that he had not totaled them. When asked if he knew that each had a total, petitioner responded that he did not know. The examiner then requested that petitioner answer the question. The referee told petitioner to look at the Exhibit and answer the question (R. 24–25). Petitioner then said each page had a total and that these totals had been upon the pages on June 27, 1960 and that he had possessed the Exhibit since that day (R. 25). He did not know, however, if the Exhibit totaled $927. He denied that this figure had been discussed, stating he could not give Timmerman credit for $927 because there was nothing in the tavern but a lot of empty bottles and cartons. The following then occurred (R. 26–27):

> Q. (interposing). I'm asking if you looked at those papers, at the figures on those papers that day.
>
> A. Yes, I did.
>
> Q. And didn't the papers contain an inventory of many empties?
>
> A. But they didn't belong to him.
>
> Q. But didn't that contain many empties?
>
> A. They were containers that belonged——
>
> THE COURT (interposing). Now you're intelligent enough to answer the question he's asking you. He asked a very simple question. Do those papers contain any figures relating to empties?
>
> A. I said Yes.
>
> THE COURT. No, you didn't. You've been making statements, but you don't answer the

question. We'll continue here, and if you don't answer the questions, I'll cite you for contempt.

A. (Witness stood up and faced the Referee, pounded his fist on the bench, and answered in a loud voice): Then cite me for contempt! This is still America and I won't be pushed around by anybody.

The COURT. This is adjourned, and I will cite you for contempt.

A. I'm going to fight for my rights.

ARGUMENT

Petitioner does not in this Court attack the finding that his conduct constituted contempt, and rightly so. His disorderly conduct in striking "the bench" while shouting his reply to the referee constituted misbehavior which interfered with the orderly administration of justice. As this Court said in *Cooke* v. *United States*, 267 U.S. 517, 534, "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court." See, also, *Ex parte Terry*, 128 U.S. 289, 308–309; *Fisher* v. *Pace*, 336 U.S. 155; *Offutt* v. *United States*, 348 U.S. 11. Section 41 of the Bankruptcy Act, *supra*, pp. 2–3, specifically provides for punishing misbehavior during a bankruptcy hearing as a contempt.

In re McConnell, No. 498, O.T. 1961, is not to the contrary. This Court there found that a mere statement of a lawyer, while attempting to make an offer of proof, was not sufficiently disruptive of the trial court's business to constitute contempt. The Court

recognized, however, "the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom." Here, before petitioner's outbursts, the referee had several times found it necessary to instruct the petitioner to answer the question posed (R. 19, 22, 24, 25). The referee had told petitioner that he could make any explanation he wanted following his answer to a question (R. 19), and advised petitioner he was entitled to a recess if he wished to consult his attorney who was present at the hearing. If petitioner or his counsel thought the interrogation was improper, they could have requested an adjournment. This they failed to do. Rather, petitioner persisted in his evasiveness and verbal sparring with the examiner, which led the referee to admonish him that he was courting adjudication for contempt. Perhaps petitioner's answers, taken alone, were not contemptuous. But the referee's warning that he might so treat them did not excuse petitioner's disrespectful and openly defiant conduct.

Petitioner attacks only the procedure followed in adjudicating him in contempt and the conduct of the Section 21(a) proceeding. None of his contentions have merit.

1. The procedure followed on the contempt hearing was in accord with due process. A formal charge was placed against petitioner by the certificate of contempt and the show cause order. The certificate of contempt, served upon petitioner, was accompanied by the complete transcript of the proceedings before

the referee. The show cause order gave petitioner ample time to prepare his defense. At the hearing before the district judge petitioner was represented by counsel and had the opportunity to present evidence.

Petitioner's only real complaint is that the government did not present live testimony in support of the charge, which he thinks Section 41(b) of the Bankruptcy Act requires when it speaks of the judge "hear[ing] the evidence as to the acts complained of." The short answer to this argument is that the government relied on the certified transcript of the proceedings before the referee, which, standing unchallenged, the court properly accepted as a true recital of the material facts. It would have been pointless, under the circumstances, to require a complete re-enactment through witnesses of what both sides agreed had occurred. The same procedure has been tacitly approved in cases involving contempt consummated before a grand jury. See, *e.g.*, *Piemonte* v. *United States*, 367 U.S. 556. There is no reason to assume a more cumbersome procedure is necessary here.

It is true the record does not reflect that the official transcript of the proceedings before the referee was formally offered into evidence. However, the record also fails to show any objection in the district court to this informal procedure. It is apparent that

[1] The fact that the complete transcript of the evidence had been furnished to petitioner prior to the hearing was beneficial to petitioner. It specifically informed him and his attorney in advance of trial what evidence petitioner had to meet.

both sides chose to rest their case on the official transcript as a fair and accurate portrayal of the proceedings.

The trial judge did not determine guilt upon the bare certificate of the referee (R. 2). He determined guilt after "having the benefit of oral argument by the respective attorneys and having examined the records and official transcript of testimony". This case is therefore totally unlike *In re McIntosh*, 73 F. 2d 908 (C.A. 9) where the district court considered itself bound by the certificate of contempt filed by the referee and would hear evidence only in mitigation of guilt. Since petitioner offered no evidence refuting or explaining the transcript, the trial judge properly made his determination on the basis of the written record of proceedings.

2. Petitioner's contentions as to the conduct of the proceeding under Section 21(a) are irrelevant to the issue of contempt. Petitioner was obligated to remain orderly and not create a disturbance. There could be no justification to disrupt the good order of the hearing by pounding on the bench. *Fisher* v. *Pace*, 336 U.S. 155, 163; *United States* v. *Sacher*, 182 F. 2d 416, 430, affirmed 343 U.S. 1. Even if the referee made an error of law, that does not excuse petitioner's conduct. Cf. *United States* v. *Mine Workers*, 330 U.S. 258, 289–295.

a. The referee ruled that petitioner's attorney could be present at the hearing and that petitioner was entitled to a recess to consult his counsel if he desired, but that the attorney would not be permitted to object to the questions asked by the attorney for the trus-

tee. In a Section 21(a) examination, an ordinary witness has no right to have his attorney participate. If the witness is also a creditor, the law is cloudy as to the extent of participation permitted to the creditor's attorney. See *In re Emigh*, 243 Fed. 988 (N.D.N.Y.); 2 Collier on *Bankruptcy* (14th ed. 1961), § 21, p. 317. If petitioner's attorney thought the referee's ruling as to his participation too narrow, he could have sought a ruling from the district court. The issue has no bearing on petitioner's conduct in pounding with his fist.

b. Similarly, there is no relevancy in the contention that the examination was not confined to the "acts, conduct or property of a bankrupt" and therefore went beyond the limits authorized by the statute. Moreover, the record does not support the contention. Petitioner does not point to any particular line of questioning which he considers objectionable. Most of the questions put to petitioner pertained to the amount of inventory the bankrupt had possessed in his tavern on June 27, 1960, and whether petitioner had accepted the bankrupt's written inventory of assets on that date, in the amount of $927, as being substantially correct (R. 12–27). Other questions related to the amount of rent that the bankrupt had agreed to pay for the rental of the tavern. It thus can be seen that the examination was confined to the property of the bankrupt. In so far as the examination also touched petitioner's claim as a creditor, this was inevitable because the assets and liabilities of the bankrupt are the liabilities and assets of his debtors and creditors.

c. Petitioner raises, but does not argue, the contention that his conduct before the referee was excusable because he was not paid his witness fees and mileage prior to his examination. If petitioner had failed to appear at the hearing, a failure to tender witness fees might have constituted a defense to such a default. See *Saper* v. *Hague*, 186 F. 2d 592 (C.A. 2). But by testifying without objecting to the nonpayment of witness fees, petitioner waived any irregularity in this respect. Once he undertook to testify, he was obliged to do so in a proper manner. The absence of fees does not excuse his misbehavior during the examination.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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